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IN THE

SUPREME COURT OF THE UNITED STATES

No. 666.

J. TURNER BUTLER & WILLIAM A. HALLOWES, as Trustees of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, *Petitioners*,

vs.

WILLIAM ALEXANDER WATTS, *Respondent*.

REPLY BRIEF OF PETITIONERS.

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Attorney for Petitioners.

2-23-59—50

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ARGUMENT.

POINT ONE.

The Court's Instruction on Comparative Negligence.

Respondent refers to a "Florida rule of appellate procedure requiring litigants to call clearly and distinctly to the trial judges' attention mistakes made in reading jury instructions." (Resp. Br. 2-3).

The only published rule dealing with the question is Rule 2.6(b), Florida Rules of Civil Procedure, which we

set out in our main brief (Br. 11). The only other "rule" is such "rule" as may be distilled from the opinion of the District Court of Appeal of Florida, Third District, in this case.

(See discussion in footnote 1, pp. 11-12 of our brief.)

Respondent admits the error in the charge but claims it was not called to the lower court's attention. Actually the requirements of Rule 2.6(b), Florida Rules of Civil Procedure, were fully complied with at the conference on charges (R. 739). The exceptions required by this rule were again noted by the trial judge himself immediately after the jury retired (R. 829).

Counsel then told the judge that, in amending Defendant's Requested Charge No. 20 at the conference on charges he had left in the last sentence. The Judge said he understood this (R. 830).

In the light of this, respondent's claims that the judge was not advised what charge was involved (Resp. Br. 3) and that petitioners seek to "sneak error into the record" (Resp. Br. 5) seem strained. The judge had just finished reading from the requested charges which were separately numbered (R. 140-180) and which had been referred to by number throughout the conference on charges.

The charges were in front of the judge when the omission was called to his attention. He asked if counsel had a special objection as to Charge No. 20 and when advised of it said he understood it (R. 830).

Had the last sentence in Charge No. 20 been given there would have been no need to make the objection to the court. Unless the last sentence of Charge No. 20 had been omitted, the objection would have been meaningless.

Respondent further claims that this case is of no importance beyond the facts of the particular case (Resp.

Br. 5). The answer to this assertion is that the statute under which the case was brought says that contributory negligence is a partial defense; the opinion of the appellate court in this case says an instruction that it is no defense at all is not cause for reversal.

POINT TWO.

The Charge on Release.

In seeking to uphold the charge on release, respondent cites that part of the opinion of the District Court of Appeal of Florida, Third District, which states that all of the charges on release took up four pages of the record and the charge upon which we seek review less than half of that.

The implication from respondent's brief is that the other charges on the question of release in some way rendered harmless the parts of the charge objected to here.

The Record shows that the charge objected to covers pages 816, 817 and part of 818. The other instructions dealing with release are set out on the remainder of page 818, the top of page 819 and the first two paragraphs of page 820.

Upon analysis, these other instructions deal with the following:

1. Burden of proof in setting aside release (bottom R. 818 and top of R. 819).
2. Presumption of sanity—(third paragraph R. 818).
3. Explanation of mental state necessary to execute a release—(first paragraph R. 818).
4. Settlement not to be considered an admission of liability (first two paragraphs, R. 820).

5. Unilateral mistake distinguished from mutual mistake (second paragraph R. 818).

We did not object below to sub-paragraph 1 of the charge upon which we seek review—that part dealing with mental competency. The other charges dealing with this (R. 818) in no way affect the parts of the charge we did object to.

The same is true as to the charge on burden of proof in setting aside a release (R. 818-819) and the charge that a settlement is not to be considered an admission of liability (R. 820). They in no way cured the charge objected to.

Of the five "other" charges, then, only one in any way overlapped the charge objected to. That was the charge dealing with the difference between unilateral and mutual mistake (R. 818).

That instruction stated that unilateral mistake was not ground for setting aside a release but that mutual mistake was (R. 818). Sub-paragraph 7 of the charge objected to told the jury that they could set aside the release if they found either (1) the parties were mistaken *or* (2) Watts (the respondent) was mistaken as to what Paffe (the claims adjuster) thought (R. 817).

This "other" charge contradicted the earlier charge in part. Rather than curing the originally erroneous instruction, it only confused the matter further, if that is possible.

CONCLUSION.

We respectfully submit that this petition for writ of certiorari should be granted.

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PROOF OF SERVICE.

I hereby certify that a copy of Reply Brief of Petitioners filed in this cause was served upon respondent pursuant to Rule 33(1), Revised Rules of the Supreme Court of the United States by depositing a copy of such petition in a United States mail box, with first-class postage prepaid, addressed to counsel of record for respondent, Mr. William S. Frates, at his post office address, 448 Pan American Bank Building, Miami 32, Florida, this day of February, 1959.

GEORGE F. GILLELAND,
Attorney for Petitioners.